Nos. 406 & 421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

RED BALL MOTOR FREIGHT, INC., et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON

Appeal From the United States District Court for the Western District of Texas, San Antonio Division

---

MOTION OF TRANSPORTATION ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF TRANSPORTATION ASSOCIATION OF AMERICA AS AMICUS CURIAE

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MOTION OF TRANSPORTATION ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Transportation Association of America (hereinafter referred to as TAA) respectfully moves this Court for leave to file the accompanying brief in these cases as *amicus curiae*. The consent of the attorneys

for the appellants herein has been obtained, but the attorney for the appellees has refused to consent to the filing of a brief by TAA as *amicus curiae*.

TAA is an industry-wide organization whose coast-to-coast membership includes an across-the-board representation of users, investors, and all six types of public transport carriers—airlines, freight forwarders, highway carriers, oil pipelines, railroads, and water carriers. Nearly half of TAA's membership consists of users of transportation services, many of which engage in private carrier operations or utilize the services of for-hire carriers specifically exempted from economic regulation.

The basic objectives of TAA are described, as follows:

(1) To develop a favorable climate that will assure the best possible transportation service at the lowest possible cost, yet provide a sufficiently attractive return to the carriers to permit financial stability;

(2) To promote and nurture public understanding of the importance of sound transportation policies and public awareness of national transport problems; and

(3) To resist steadfastly all trends which might lead to government ownership or operation of any form of transporation.

TAA asks leave to file the accompanying brief to urge this Court (1) to give careful, deliberate, and thoughtful consideration to the interpretation of the federal legislation here under review and (2) to reverse the judgment of the court below in both proceedings.

TAA's brief does not attempt to restate all contentions made by the appellants in the lower court or in their respective jurisdictional statements now before this Court. Rather, the brief expresses the concern of TAA as a national policy-making association about the *trend away from common carriage and the growth of unregulated carriage*, particularly that portion represented by unlawful for-hire transport under the guise of private carriage.

TAA's Board of Directors, including more than 100 prominent leaders in industry, agriculture, and education are identified in Appendix I of the accompanying brief. This Board of Directors—all members with a strong interest in sound national transportation policies—has for many years approved TAA policy positions in support of greater stability of the regulated segment of the transport industry essential to both large and small shippers and the general public.

In fact, TAA actively supported federal legislation enacted in 1957 and 1958 which was designed to restrict and reduce growing unlawful for-hire motor transportation, so detrimental to the economic strength of our publicly regulated carriers. Indeed, TAA proposed to the Congress an amendment to Section 203(c) of the Interstate Commerce Act (49 U.S.C., Section 303 (c)) which was enacted in substantial part in 1958 and which is now before this Court for the first time for interpretation.

TAA is the only nationwide transport organization with representation from all transport interests. It played an active role in the enactment of the legislation here in issue. It has maintained continuous research of current transport trends. It is believed, therefore,

that the accompanying brief contains helpful information about national policy and public interest aspects of importance to the issue in these cases, which information has not or will not be presented by the other parties.

Respectfully submitted,

ROBERT E. REDDING
Vice President and General Counsel
1710 H Street, N. W.
Washington 6, D. C.

October 4, 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 406

RED BALL MOTOR FREIGHT, INC., et al., *Appellants*

v.

EMMA SHANNON and RICHARD J. SHANNON, d/b/a E. and R. SHANNON

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UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al., *Appellants*

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Appeal From the United States District Court for the Western District of Texas, San Antonio Division

---

BRIEF OF TRANSPORTATION ASSOCIATION OF AMERICA AS AMICUS CURIAE

By leave of this Court, the Transportation Association of America (hereinafter referred to as TAA) files this brief as *amicus curiae*.

I. INTEREST OF THE AMICUS CURIAE

TAA is an industry-wide organization whose coast-to-coast membership includes an across-the-board representation of users, investors, and all six types of public transport carriers—airlines, freight forwarders, highway carriers, oil pipelines, railroads, and water carriers. Nearly half of TAA's membership consists of users of transportation services, many of which engage in private carrier operations or utilize the services of for-hire carriers specifically exempted from economic regulation.

The basic objectives of TAA are described as follows:

(1) To develop a favorable climate that will assure the best possible transportation service at the lowest possible cost, yet provide a sufficiently attractive return to the carriers to permit financial stability;

(2) To promote and nurture public understanding of the importance of sound transportation policies and public awareness of national transport problems; and

(3) To resist steadfastly all trends which might lead to government ownership or operation of any form of transportation.

TAA's Board of Directors, including more than 100 prominent leaders in industry, agriculture, and education, are identified in Appendix I of this brief. This Board of Directors—all members with a strong interest in sound national transportation policies—has for many years approved TAA policy positions in support of greater stability of the regulated segment of the

transport industry essential to both large and small shippers and the general public.

In fact, TAA actively supported federal legislation enacted in 1957 and 1958 which was designed to restrict and reduce growing unauthorized for-hire motor transportation so detrimental to the economic strength of our publicly regulated carriers. Indeed, TAA proposed to the Congress an amendment to Section 203 (c) of the Interstate Commerce Act (49 U.S.C., Section 303 (c)) which was enacted in substantial part in 1958 and which is now before this Court for the first time for interpretation.

When TAA, in 1958, urged the enactment of legislation which amended Section 203 (c) of the Interstate Commerce Act, and is now here under review, the purpose of TAA was explained by Dr. George P. Baker, then President of TAA (now Chairman of the Board of Directors), and Professor of Transportation (now Dean) of the Harvard Graduate School of Business Administration, as follows:

> "The purpose of the Association is to do whatever it can to preserve a private enterprise transportation system in this country.
>
> "It was felt that in an area such as transportation, which is a closely regulated area, this requires keeping the laws up to date with the changing times and the history seems to indicate that where you have these particular groups vitally interested—users and investors and different forms of carriers—in this problem, it is extremely difficult to get legislation to keep laws up to date unless you work out among these different interest groups some common position, because so often the groups who oppose are able to stop legislation and the

groups who are for it have great difficulty in getting it.

"The purpose of this organization is to have a forum where these different interest groups can try to express their opinions, learn what the other views are, and then try to work out some common position. The mechanism we do this through is what we call our Cooperative Project. We have a panel or committee structure. We have a User Panel made up of leaders of users of transportation who act as individuals. We have an Investor Panel, and then we have panels for the six forms of transportation that you know, including freight forwarders.

"These controversial proposals we throw at these committees. They take their positions. If these positions differ, as they usually do, we then have joint meetings of representatives, and we simply try to work out some compromise which will still be a constructive one. After that, these reports go to the Board of Directors. The Board of Directors takes a position, and then we endeavor to coordinate the efforts of these interest groups in Washington during the period that they try to get that put into legislation.

"In addition, we have one other activity, which is general public education on transportation problems. We do this through meetings around the country and through a certain amount of literature.

"That is the purpose of the Association."[1]

---

[1] Hearings on Redefinition of Private Carrier of Property by Motor Vehicle (H. R. 5825) before a subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives, 85th Cong., 2d. Sess., April 29, 1958, p. 16.

II. ARGUMENT

A. A Compelling Need Existed in 1957 and 1958 for Federal Legislation to Help Curb Unlawful For-Hire Motor Transportation.

During the early 1950's regulated trucking companies and railroads and the Interstate Commerce Commission (hereinafter referred to as the ICC) became increasingly concerned about the infringement of the for-hire transportation field by carriers operating under the guise of private carriage. In its 70th Annual Report, published in November, 1956, the ICC urged legislative action to make it clear that all for-hire motor carrier transportation, whatever its form, other than that specifically exempted, be made subject to regulation. The justification for such legislation was described at pages 161-2 of said report, as follows:

> "There is a large area of motor transportation which, although cloaked with the form of private transportation, is not, in our opinion, private carriage as defined by the courts in the Lenoir Chair case (*Brooks Transportation Co.* v. *United States*, 340 U.S. 925).
>
> "The principal business of persons engaged in this type of activity is, in fact, transportation, and the movement or carriage of property by them is not in furtherance of any primary or bona fide business enterprise other than transportation. Because the act defines common carriage and contract carriage specifically, the courts tend to construe these definitions strictly. This has left an area in which persons are engaging in the business of moving goods but which is regarded not subject to regulation as common or contract carriage. This situation does not give to the public the protection which it should receive and creates unstable conditions in the transportation industry

because unauthorized for-hire transportation is fostered through various devices."

In 1957, the Congress added Section 203 (c) to the Interstate Commerce Act, to prohibit persons from engaging in any for-hire transportation business by motor vehicle without ICC authority (See Appendix II). TAA supported this legislation.

In 1958, the Congress again considered legislation in this area. The principal objective of both the ICC and TAA in 1958 was to prohibit the "buy-and-sell" device employed by some pseudo private carriers as an outright subterfuge to avoid regulation. By this action, a shipper or trucker purchases the goods he transports at origin and sells them at destination with a profit derived from the carriage performed, thereby purporting to be a private carrier because he claims ownership of the goods while in transit.

The ICC-sponsored bills in the Second Session of the 85th Congress (H.R. 5825 and S. 1677) dealt solely with buy-and-sell activities, whereas the TAA proposal was written in broader language to encompass those activities, as well as other similar subterfuges which might be employed to engage in unauthorized for-hire transportation. The TAA-sponsored proposal did not affect legitimate private carriers and was at all times consistent with the basic TAA ground rule that "There should be no legislative restriction against private carriers (the user performing transportation of his own goods for his own account) except for safety purposes."

The legislative history of the 1958 amendment to Section 203 (c) makes it clear that the Congressional committees favoring such legislation were also con-

cerned about the growing practice of engaging in for-hire transport, under the guise of private carriage, and thus evading economic regulations. This was being done by the use of various subterfuges, including the buy-and-sell method.[2]

It was emphasized by TAA and other interested parties that the 1958 amendment would not upset the "primary business test" then utilized by the courts to determine the legality of transport operations by private carriers, as established in *Brooks Transportation Co.* v. *United States, supra.* Opponents of such legislation contended that it was unnecessary to enact into law a principle laid down by the United States Supreme Court. Both TAA and the ICC nonetheless endorsed such legislation and the Congress concurred, the basis therefor being summed up in the testimony of the then chairman of the ICC, as follows:

> "The enactment into law of a principle laid down by the Supreme Court is certainly not without precedent . . . The very fact that difficulties have arisen in applying the law to the various factual situations involving illegal for-hire carriage has the undesirable effect of encouraging violations. It seems clear, therefore, that specific legislation dealing with this problem, backed up by legislative history, would be a deterrent to violations and would provide us with statutory support in enforcement proceedings before the courts."

The intention of the Congress to take definitive legislative action in 1958 which would clearly subject buy-and-sell operations to ICC economic regulation was emphasized by the Conference Committee action pre-

[2] See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17-18; S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23, 24.

ceding final approval of the pending bill. The rejection of weak language for the stronger language now in the law, in order to assure strict interpretation of subterfuge techniques, was described in the Conference report as follows:

> "The House Amendment provided that no person should, in connection with any business enterprise other than transportation, transport property by motor vehicle in interstate or foreign commerce unless such transportation was *incidental to*, and in furtherance of, a primary business enterprise, other than transportation, of such person. The conference agreement provides that no person, engaged in any business enterprise other than transportation, shall transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is *within the scope* and in furtherance of a primary *business enterprise*, other than transportation, of such person."[13] (Emphasis added)

In sum, the 1957 and 1958 amendments of the Interstate Commerce Act were strongly urged by government and industry alike in order to strengthen the nation's transportation system.

B. The Need for More Effective Sanctions Against Illegal For-Hire Motor Transportation Continues to Exist.

Since the end of World War II, our country has witnessed an impressive growth in the transportation of goods by truck. For example, the volume of intercity truck traffic, public and private, was 102 billion ton-miles in 1947. By 1962, trucks were handling an estimated 332 billion ton-miles of intercity freight, a

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[13] *Conference Report on Transportation Act of 1958*, 85th Cong., 2d Sess., p. 16.

gain of 225%—or more than 3 times the 69% growth in the nation's total output of goods and services during the same period, as measured by the Gross National Product in terms of constant dollars.

The following table reflects the relative growth in intercity freight traffic during the post World War II period by both trucking and rail carriers:

Billions of Intercity Ton-Miles

	Rail	*ICC Truck*	*Non-ICC Truck*
1947	665	38	64
1962	600	117	215
Change	—65	+79	+151

From the above, it will be noted that the unregulated truckers during this period have captured nearly twice as much of the added traffic as the ICC-regulated truckers, while rail traffic volume actually dropped by 10%.

What is disturbing about this increasing use of unregulated carriers is the fact that an unknown, but apparently sizeable, portion of this unregulated truck traffic is illegal. In other words, a significant share of this unregulated freight traffic is being handled by carriers who are engaging in interstate for-hire transportation without proper operating authority from the ICC. If such illegal for-hire trucking operations are allowed to continue, *they will threaten the existence of our regulated national transportation system and lead to attempts to nationalize this industry.*

Such illegal trucking operations have been estimated by the ICC as applying to over 11 billion ton-miles of

traffic a year, which TAA estimates represents $800 million annually in freight revenues to the common carriers. An ICC staff report, entitled "Gray Area of Transportation Operations", estimates that more than 20% of the illegal for-hire transport practices consists of buy-and-sell operations which are prohibited by the 1958 amendment to the Interstate Commerce Act.

In an effort to cope with the growing problem, the ICC is making a determined effort to control the illegal operations of truckers, especially those involving buy-and-sell operations. The number of ICC proceedings and court cases is increasing. For example, during the twelve-month period ended April 30, 1963, a total of 1,045 enforcement cases against motor carriers was successfully concluded, including 895 court cases and 150 proceedings before the Commission. While this stepped up program is to be commended, it is limited by the inadequate ICC personnel and funds to carry out an effective enforcement program and by the delays inherent in our present system of jurisprudence. For example, the original investigation of the operations of appellees herein was ordered by the ICC on June 21, 1956, *more than seven years ago.*

A number of states are also making determined efforts to curb violations but on a somewhat limited basis. For example, Illinois investigators made 4,053 arrests in 1960, compared with 3,448 the year before and only 66 in 1956. Enforcement activities have been stepped up, however, by a special committee organized by the National Conference of State Transportation Specialists, a working group of the National Association of Railroad and Utility Commissioners.

Industry organizations have also been active in combating the bootleg trucking problem. TAA in 1961 took the lead in establishing the Committee Against Unlawful Transportation (commonly referred to as CAUT), with a widespread membership of transport interests, to perform an educational function and coordinate the efforts of other interested groups. The National Industrial Traffic League, representing shippers throughout the country, has urged its members to assist in every way to avoid the aiding or abetting of unlawful transportation. The American Trucking Associations, Inc., which represents common, contract, and private motor carriers, has also been concerned about illegal truck operations and is studying the question.

The private carrier associations are also gravely concerned about the problem and have prepared considerable material for use of their shipper members, alerting them to the adverse effects of illegal for-hire operations. They are particularly concerned about the potential impact on private carriers that might result from changes in our present laws dealing with the enforcement of motor carrier regulations.

This subject has also received the recent attention of the President of the United States. President Kennedy, in his Transportation Message to the Congress on April 5, 1962, described common carriage as "the core of our transport system" and noted that "the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier."

Less than a month later, the Secretary of Commerce submitted proposed legislation to the Congress to in-

crease enforcement activities on the highways, stating that the purpose of such legislation is "to help eliminate unlawful ('gray area') trucking operations which abound because of diverse, ambiguous laws and practical limitations in enforcement." Such legislation is now actively under review by the Congress.

As recently as September 18, 1963, Senator Smathers delivered an extensive statement on the floor of the United States Senate on the subject of illegal activities in the operations of motor carriers. Senator Smathers referred to his introduction of corrective legislation in 1961, when he was serving as chairman of the Surface Transportation Subcommittee of the Senate Commerce Committee. Senator Smathers commented, as follows:

"Introduction of the measure followed extensive hearings in that year which demonstrated that unlawful trucking had put great pressure on all modes of regulated common carriage and seriously threatened to undermine the ability of these carriers to serve the public."[1]

Senator Smathers' bill, S. 2560, became known as the "gray area bill" and passed the Senate without dissent in the summer of 1962 shortly before adjournment of the Second Session of the 87th Congress. Because of his continuing concern about the problem of unlawful transportation, Senator Smathers on September 18, 1963, introduced S. 2152, essentially similar to the former S. 2560, and urged "expeditious and favorable consideration."

It is submitted that the need for more effective sanctions against illegal for-hire motor transportation continues to exist.

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[1] *Congressional Record*, September 18, 1963, p. 16449.

C. The Lower Court's Judgment in the Instant Cases Should Be Reversed.

The appellants hereto have argued the merits of the instant cases at length in their respective jurisdictional statements. Such argument will not be repeated herein. TAA regrets, however, that the court below gave no apparent recognition to the fundamental policy problems or Congressional intent embodied in Section 203 (c). The case was disposed of without a single mention of the statutory standard, the primary business test, so clearly applicable to the instant proceedings.

Appellees admit that the buy-and-sell sugar operation was engaged in to avoid an empty backhaul, and thereby to profit from such backhaul. Under similar circumstances, the District Court for the Western District of Louisiana, Lake Charles Division, held that such activity constituted for-hire rather than private carriage, asserting that "this economic benefit accruing to the noncarrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Interstate Commerce Act."[5]

III. CONCLUSION

TAA is deeply concerned about the trend away from common carriage and the growth of unlawful for-hire transport under the guise of private carriage. TAA fears that the present statutory language under review herein, Section 203 (c) of the Interstate Commerce Act, will lose its effectiveness in preventing pseudo private carriage if the lower court judgment in the

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[5] *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508, 512 (1961).

subject proceedings is affirmed. This would neither be in the national interest nor in accord with the intent of Congress.

Accordingly, TAA respectfully urges this Court to take full cognizance and give due weight to the current alarming trends in the field of motor transportation. In our judgment, a substantial question is presented and the judgment below should be reversed.

Respectfully submitted,

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October 4, 1963

APPENDIX I

TRANSPORTATION ASSOCIATION OF AMERICA

BOARD OF DIRECTORS

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Dean and Professor of
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J. L. S. Snead, Jr.
Rumson, New Jersey

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First National City Bank
New York, New York

W. J. Sullivan, Director of Traffic
Allied Chemical Corporation
New York, New York

A. M. Thomas, Director of Traffic
General Mills, Inc.
Minneapolis, Minnesota

Robert E. Thomas, President
Mid-America Pipeline Company
Tulsa, Oklahoma

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Chicago, Illinois

APPENDIX II

Section 203 (c) of the Interstate Commerce Act, 49 U.S.C. Section 303 (c), provides, as follows:

> Sec. 203(c) • • • no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.